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NOTE

THE TOLL FOR TRAVELING STUDENTS: DURATIONAL-RESIDENCE REQUIREMENTS FOR IN-STATE TUITION AFTER *SAENZ V. ROE*

*Douglas R. Chartier**

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INTRODUCTION

After the excitement of getting into the college of her choice wears off, a student may soon wonder how she will pay for her newfound prize. Though higher education is almost always a sound investment given its potentially tremendous return and importance in getting a good job, the cost is daunting—sometimes even prohibitive—for many students. Public undergraduate

* Who is, no doubt, a disgruntled student paying out-of-state tuition in his third year of law school. In addition to various financial institutions, I am indebted to my editors, Mike Lechliter and Dana Kaersvang, for their valuable advice and insight. I also owe much to Alicia Frostick, Kamal Ghali, Chris Grostic, Christie Hammerle, and Tim Wyse, who make up the best Notes Office anyone could hope for. Their dedication and commitment to excellence is contagious. Most importantly, I must thank Janet Hsu for her love and support, and for always being—in the words of the Isley Brothers—a "positive motivating force within my life."

and graduate schools are an attractive option for many students because of lower tuitions. Yet state universities deny many students the full measure of this benefit.

Public universities usually charge significantly higher tuition rates to out-of-state students than in-state students. A nonresident student may find herself paying as much as three times what her resident counterparts pay.[1] Consequently, a student's classification as a resident or nonresident may determine whether she can afford higher education. State statutes and school regulations often require that students have resided in the state for at least a year before they can be classified as residents for tuition purposes.[2] As a result, state colleges frequently deny many students the benefit of lower tuition for at least a year, regardless of their intentions to make the state their permanent home.

These sorts of waiting periods, which require that a person have resided in a state for a particular period of time before she is entitled to a benefit, are called durational-residence requirements.[3] Durational-residence requirements raise a red flag for many constitutional law scholars because the Supreme Court has struck down many—though not all—of them. It is therefore unsurprising that many lawyers and scholars have argued that durational-residence requirements for in-state tuition are unconstitutional. Nevertheless, no court has found these requirements unconstitutional.

The Supreme Court has repeatedly recognized that durational-residence requirements implicate the fundamental right to travel.[4] In *Shapiro v. Thompson*, the Court struck down one-year durational-residence requirements for welfare benefits in Connecticut, Pennsylvania, and Washington, D.C.[5] The Court established a framework with which to evaluate durational-

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1. For example, for the 2004–05 school year, the University of Michigan's College of Literature, Science & the Arts charged lower-division tuition and fees of $8,201.38 per year for resident students and $26,027.38 per year for nonresident students. UNIV. OF MICH.—ANN ARBOR, ACADEMIC YEAR TUITION AND FEES FOR FULL-TIME STUDENTS BY DEGREE LEVEL, ACADEMIC UNIT, AND RESIDENCY 1–2 (July 22, 2005), http://www.umich.edu/~oapainfo/TABLES/PDF/UMAA_TuitFee_History.pdf. For the same school year, the tuition and fees at the University of California at Berkeley were $6,729.90 per year for resident students and $23,685.90 for nonresident students. UNIV. OF CAL., BERKELEY, 2004–05 FEE SCHEDULE, http://registrar.berkeley.edu/Registration/feesched0405.html (last visited Oct. 2, 2005).

2. Examples of states that impose such requirements for in-state tuition at public colleges and universities include Arizona, ARIZ. REV. STAT. ANN. § 15-1802 (2002), California, CAL. EDUC. CODE §§ 68017–18 (West 2001), Colorado, COLO. REV. STAT. ANN. § 23-7-102(5) (2004), New York, N.Y. COMP. CODES. R. & REGS. tit. 8, § 302.1(a)(6) (2001), North Carolina, N.C. GEN. STAT. § 116-143.1(b) (2003), and Texas, TEX. EDUC. CODE. ANN. § 54.052 (Vernon 1996 & Supp. 2004).

3. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 832 (2d ed. 2002).

4. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969). In *United States v. Guest*, 383 U.S. 745 (1966), the Supreme Court first declared that there is a fundamental right to travel. Although the Constitution does not expressly mention this right, the right to travel has been viewed as necessary to bind together the strong union of the United States. *Id.* at 758. The right to travel not only allows a person to travel for political purposes but ensures that a person can escape an undesirable majority and relocate to a community with which his values and views are more compatible. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 178–79 (1980).

5. 394 U.S. at 638.

residence requirements. First, after noting that there was weighty evidence that the statutes' purposes were to exclude the poor from the states,[6] the Court held that the purpose of deterring the migration of the indigent into the state was constitutionality impermissible because it served to penalize those who exercised their fundamental right to travel.[7] Then, with respect to other justifications that the states advanced for the requirements, the Court held that under the Equal Protection Clause of the Fourteenth Amendment, classifications serving to penalize the exercise of the right to travel must survive strict scrutiny.[8] The Court concluded that the laws failed to meet that standard.[9]

In focusing on penalties upon the right to travel, *Shapiro* established a "severe-penalties" rule in analyzing durational-residence requirements.[10] Under this rule, state laws imposing severe burdens on interstate travel must survive strict scrutiny.[11] Unfortunately, the Court did not elaborate on what constitutes a "penalty." In what would be important for later cases, however, the Court did observe that the law created a classification denying a group the "ability . . . to obtain the very means to subsist—food, shelter, and other necessities of life."[12]

Perhaps recognizing the myriad durational-residence requirements in existence, the Court carefully qualified its holding. In what would haunt future judicial review of durational-residence requirements for in-state tuition, the Court stated in an infamous footnote that its holding implied "no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, *eligibility for tuition-free education*, to obtain a license to practice a profession, to hunt or fish, and so forth."[13]

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6. *Id.* at 628.

7. *Id.* at 631.

8. *See id.* at 634.

9. *Id.* at 638. The states advanced four justifications for the durational-residence requirements: facilitating budget predictability, providing administrative ease in determining residence, preventing fraud, and encouraging new residents to joint the labor force promptly. *Id.* at 634–37. None survived scrutiny. The Court concluded that the justification of facilitating budget predictability was unsupported by the record. *Id.* at 634–35. Further, given other facts available to welfare authorities, the durational-residence requirement was found to be unnecessary to the state's justification of administrative efficiency in determining residency. *Id.* at 636. The means were also not narrowly tailored to the goal of preventing fraud. *Id.* at 637. Finally, the Court found that the state's justification of encouraging new residents to join the workforce had no rational relationship to the law. *Id.* at 637–38.

10. Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 282 (discussing how Justice Marshall construed *Shapiro* as establishing a severe penalties approach in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)).

11. *See id.*

12. *Shapiro*, 394 U.S. at 627.

13. *Id.* at 638 n.21 (second emphasis added). The Court has since chipped away at this qualification. *See infra* notes 123–124 and accompanying text.

Later cases elaborated upon what constituted a penalty upon the exercise of the right to travel. In *Memorial Hospital v. Maricopa County*,[14] the Court held as unconstitutional the denial of nonemergency medical care to indigent people who had resided in the county for less than one year.[15] Consistent with *Shapiro*, *Maricopa County* concluded that nonemergency medical care was at least as much of a basic necessity of life to an indigent person as welfare benefits.[16] The Supreme Court also used the *Shapiro* analysis to strike down a one-year durational-residence requirement for voting in *Dunn v. Blumstein*.[17] The Court applied strict scrutiny under the Equal Protection Clause because the law penalized people who recently exercised their right to travel.[18] As a result, the Court revealed that "penalties" upon the right to travel include more than just denials of basic necessities of life; they also include denials of the "basic right to vote."[19] In addition, *Blumstein* made clear that a durational-residence requirement can be unconstitutional even when it neither seeks to deter nor actually deters travel.[20] The Court has, however, upheld durational-residence requirements for divorce petitions, although the Court's reasoning was highly dubious.[21]

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14. 415 U.S. 250 (1974).

15. *Id.* at 269–70.

16. *Id.* at 259.

17. 405 U.S. 330 (1972). At issue was a Tennessee law authorizing voter registration only for those who had been residents of the state for a year and residents of their counties for three months. *Id.* at 331. Subsequently, the Court has allowed states to impose durational-residence requirements of up to fifty days in order to prepare adequate voting records and protect against fraud. *See* Marston v. Lewis, 410 U.S. 679, 680–81 (1973).

18. *See Dunn*, 405 U.S. at 338. Alternatively, the Court concluded that Equal Protection required strict scrutiny because the classification denied some residents the fundamental right to vote. *Id.*

19. *See id.* at 342. The Court stressed that the law "force[d] a person who wishe[d] to travel and change residences to choose between travel and the basic right to vote." *Id.*

20. *See id.* at 339–40

21. *See* Sosna v. Iowa, 419 U.S. 393 (1975). An Iowa statute required that one have resided in the state for at least a year before she could file a petition for divorce. *See id.* at 395–96. Then-Justice Rehnquist upheld the law and distinguished *Shapiro*, *Blumstein*, and *Maricopa County* on two grounds. First, he stated that in the prior cases, the states justified the durational-residence requirements on the basis of budgetary or recordkeeping considerations. *Id.* at 406. In contrast, Justice Rehnquist found that the law in question could be justified on the grounds that (1) the state did not want to be a "divorce mill for unhappy spouses" and (2) the state wished to protect its divorce decrees from collateral attack. *Id.* at 406–08. Second, he stated that the prior cases irretrievably foreclosed new residents from obtaining some part of the benefits sought. *Id.* at 406. He concluded that the Iowa law, in contrast, merely delayed, rather than denied, new residents access to the courts; after the one-year waiting period, they could obtain a divorce. *See id.* Having concluded that the Iowa law was "of a different stripe" than those in *Shapiro*, *Blumstein*, and *Maricopa County*, Justice Rehnquist held that the durational-residence requirement was constitutional under an unstated —but most likely rational-basis—level of scrutiny under Equal Protection. *See id.* at 406–10. Justice Marshall's dissent criticized the majority because the law in *Maricopa County* similarly denied indigents benefits for only a year. *Id.* at 422 (Marshall, J., dissenting). He also stressed that the state's denial of divorce to a new resident similarly served as a severe penalty upon the right to travel. *Id.* at 420 (Marshall, J., dissenting). Justice Marshall would have applied strict scrutiny and held the law unconstitutional. *Id.* at 420, 427 (Marshall, J., dissenting).

In its most recent review of a durational-residence requirement in *Saenz v. Roe*,[22] the Supreme Court threw many new surprises into the constitutional analysis of these laws. At issue was a California law that limited new residents, for the first year of their residence in the state, to the welfare benefits they would have received in their prior states of residence.[23] Unlike *Shapiro*, the law did not completely deny a benefit; rather, it potentially reduced the benefits for one year. In its defense, California claimed that the law would save the state $10.9 million per year in welfare costs.[24] California also argued that the law had no punitive effect because newly arrived welfare recipients received the same welfare benefits they would have in their previous states of residence; the law thus made them no worse off.[25] The state was likely trying to avoid *Shapiro*'s call for strict scrutiny when a law "penalizes" the exercise of the right to travel.

An unconvinced Court struck down the law. The Court stated that the right to travel includes three components: (1) the right of a citizen of one state to enter and leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when one is temporarily in another state; and (3) the right for travelers who elect to become permanent residents of a state to be treated like other citizens of the state.[26] The Court concluded that this case involved the third component, which it found rooted in the Privileges or Immunities Clause of the Fourteenth Amendment.[27] As with *Shapiro* and its progeny, the Court applied strict scrutiny in striking down the California law.[28] The Court held that the law failed strict scrutiny

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22. 526 U.S. 489 (1999).

23. *Id.* at 493. This requirement, however, could benefit only California. If a resident's prior state of residence offered more generous benefits than California, the resident's welfare benefits would be capped at California's maximum. *Id.* at 493 n.1 (quoting CAL. WELF. & INST. CODE. ANN. § 11450.03 (West Supp. 1999)).

24. *Id.* at 497.

25. *Id.*

26. *Id.* at 500.

27. *Id.* at 502–03. The Privileges or Immunities Clause reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

In addition to identifying three components of the right to travel for the first time, *Saenz* finally identified the textual source of the fundamental right to travel. Kathleen Winchell, Note, *Disparate Treatment of Students in a Similar Class: The Constitutionality of Kentucky's Method of Determining Residency Status for Admission and Tuition Assessment Purposes*, 40 BRANDEIS L.J. 1037, 1050 (2002). This identification was significant because in earlier opinions implicating the right to travel, the Court at times was arguably "smug in its refusal" to provide a source. ELY, *supra* note 4, at 177.

28. The Court stated that

> [n]either mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in Shapiro, but it is surely no less strict.

Saenz, 526 U.S. at 504 (emphasis added) (citation omitted). As a result, the Court appeared to apply at least strict scrutiny. Though it is unclear whether the Court intended to make durational-residence requirements unconstitutional per se, see infra Section II.C, at least one commentator has argued that Saenz erected an insurmountable barrier to durational-residence requirements. *See, e.g.*, Erika

because the state's justification of saving money had no relevance to the duration of the recipients' residence in California or their prior states of residence.[29]

Saenz's critical innovation was to broaden the analysis from *Shapiro*'s severe-penalties rule. Similar to its position in *Blumstein* concerning a durational-residence requirement's actual deterrence to travel, the Court rejected California's justification that the requirement only "incidentally" affected the right to travel.[30] The Court then concluded that because a newly arrived citizen has a right to be treated equally in her state, a discriminatory classification itself serves as a penalty.[31] Thus, the Court shifted the focus from severe penalties upon the exercise of the right to travel to discrimination against those who have exercised that right.

Like the footnote in *Shapiro*, *Saenz* included language that would persuade other courts to limit its future applicability. The Court asserted that the welfare benefits in question could only be consumed while the recipient remained in California.[32] The Court then established a "portability distinction" between welfare benefits and "readily portable benefit[s], such as divorce or a *college education*, that will be enjoyed after [citizens of other states] return to their original domicile."[33] This language would later serve to thwart efforts in lower courts to strike down durational-residence requirements for in-state tuition.

Both before and after the *Saenz* decision, challenges to durational-residence requirements for in-state tuition at public colleges and universities were invariably unsuccessful. The Supreme Court has never conducted a significant analysis of this issue. The Court has held that states may restrict tuition-free education to bona fide residents.[34] Therefore, a fortiori, the Constitution allows states to charge nonresidents higher tuition than bona fide residents. Furthermore, in dicta, the Court suggested in *Vlandis v. Kline*[35] that as an *element* in determining bona fide residence for tuition purposes, states may impose a reasonable waiting period that can be met while the student is a student.[36]

Despite this suggestion, the Supreme Court has never written an opinion on the constitutionality of durational-residence requirements for in-state tuition. The Court has summarily affirmed two post-*Shapiro* district court

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K. Nelson, Comment, *Unanswered Questions: The Implications of* Saenz v. Roe *for Durational Residency Requirements*, 49 U. KAN. L. REV. 193, 212–13 (2000).

29. *Saenz*, 526 U.S. at 507.

30. *See id.* at 504; cf. Dunn v. Blumstein, 405 U.S. 330, 339–40 (1972).

31. *Saenz*, 526 U.S. at 505 ("But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.").

32. *Id.*

33. *Id.* (emphasis added).

34. *See* Martinez v. Bynum, 461 U.S 321, 330, 333 (1983). Bona fide residence requires both presence and an intention to remain in the state. *Id.* at 330.

35. 412 U.S. 441 (1972).

36. *Id.* at 452. In *Vlandis*, the Court struck down under Due Process a Connecticut law that created a permanent, irrebuttable presumption of nonresidence for students who were not state residents at their times of application. *See id.* at 442–43, 452.

decisions, *Starns v. Malkerson*[37] and *Sturgis v. Washington*,[38] that hold that these requirements are constitutional.[39] The Court issued no opinion in either case, leaving its thought processes a mystery.

Several pre-*Saenz* state courts reviewed the constitutionality of these durational-residence requirements, and all upheld them under rational basis review.[40] *Kirk v. The Board of Regents of the University of California*[41]—to which many later tuition cases cited[42]—relied on the footnote in *Shapiro* concerning tuition-free education to conclude that the Supreme Court must not have intended for *Shapiro*'s standard of review to apply to such durational-residence requirements.[43] The *Kirk* court and others have frequently held that the following justifications were rationally related to the requirements: (1) achieving partial cost equalization and (2) providing the tuition reduction only for those who are prepared to make greater contributions to the state's economy and future.[44]

The only case that has evaluated durational-residence requirements for in-state tuition in light of *Saenz* is the unpublished decision *Markowitz v. University of California, Hastings College of the Law*.[45] The court relied upon *Kirk* to uphold a California statute imposing a one-year

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37. 326 F. Supp. 234 (D. Minn. 1970) (upholding a regulation promulgated by the University of Minnesota imposing a one-year durational-residence requirement for residency classification).

38. 368 F. Supp. 38 (W.D. Wash. 1973) (upholding a Washington-state statute imposing a one-year durational-residence requirement for residence classification for tuition purposes at the University of Washington).

39. *See* Sturgis v. Washington, 414 U.S. 1057 (1973), *aff'g* 368 F. Supp. 38 (W.D. Wash. 1973); Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970).

40. *See, e.g.*, Eastman v. Univ. of Mich., 30 F.3d 670 (6th Cir. 1994); Kirk v. Bd. of Regents of the Univ. of Cal., 78 Cal. Rptr. 260 (Ct. App. 1969) (construing the footnote in *Shapiro* as requiring rational basis review); Gurfinkel v. L.A. Cmty. Coll. Dist., 175 Cal. Rptr. 201 (Ct. App. 1981) (using largely the same reasoning as *Kirk*). The Arizona Supreme Court also upheld an Arizona Board of Regents rule imposing a one-year durational-residence requirement for in-state tuition. *See* Ariz. Bd. of Regents v. Harper, 495 P.2d 453 (Ariz. 1972). The Arizona Supreme Court did not believe that the requirement would deter interstate travel and deferred to the precedent of *Starns*, *Sturgis*, and *Kirk* in declining to apply Shapiro. *See id.* at 455–57. Similar to Chief Justice Rehnquist's dissent in Saenz, the court concluded that the durational-residence requirement was the only tool available to the state in determining the residence status of a student. *Id.* at 457.

41. 78 Cal. Rptr. 260 (Ct. App. 1969).

42. *See, e.g.*, *Markowitz v. Univ. of Calif*, No. A096182, 2002 WL 31428619, at *2–3 (Cal. Ct. App. Oct. 30, 2002); *Gurfinkel*, 175 Cal. Rptr. at 203–04.

43. *See Kirk*, 78 Cal. Rptr. at 266 ("We do not think the addition of this footnote was an idle act to indicate the obvious fact that the opinion dealt merely with the questions presented. Rather, we read the footnote to mean that the court did not necessarily intend to apply the same standards to other residents [sic] requirements like the one here in question."). Then, the court distinguished Shapiro on largely the same grounds as Starns and *Sturgis*. *See id.* at 269.

44. *See, e.g.*, *id.* at 269.

45. No. A096182, 2002 WL 31428619 (Cal. Ct. App. Oct. 30, 2002). *Teitel v. University of Houston Board of Regents*, 285 F. Supp. 2d 865 (S.D. Tex. 2002), and *Ward v. Temple University*, No. Civ.A. 02-7414, 2003 WL 21281768 (E.D. Pa. Jan. 2, 2003), upheld one-year waiting periods but did not implicate the right to travel or even cite to *Saenz*. In *Ward*, the court simply concluded that residency status for tuition purposes was not a suspect classification and applied rational basis under Equal Protection. *See Ward*, 2003 WL 21281768, at *6. The author does not know why these courts did not even consider the ramifications of *Saenz*.

durational-residence requirement at state colleges.[46] In a very brief discussion, the court held that *Saenz* did not compel heightened scrutiny for the benefits in question.[47] The court seized upon *Saenz*'s portability distinction, stating that *Saenz* "implicitly" concluded that portable benefits such as reduced college tuition are not among the privileges or immunities guaranteed by the Constitution.[48] Once again, partial cost equalization served as a rational basis.[49]

Despite that no challenge has succeeded, this Note contends that durational-residence requirements for in-state tuition at public colleges and universities do indeed violate the fundamental right to travel. Part I argues that *Saenz*'s portability distinction is illusory and should not preclude the decision's reasoning from applying to requirements for college tuition. Part II then asserts that because *Saenz* has moved from a severe-penalties rule to a nondiscrimination rule, courts should apply strict scrutiny in evaluating durational-residence requirements for in-state tuition. Furthermore, this movement undoes the reasoning behind pre-*Saenz* precedent that declined to apply heightened scrutiny. Finally, Part III argues that these requirements should fail strict scrutiny because either the state interests are not compelling or the means are not narrowly tailored to those interests.

I. THE ILLUSION OF *SAENZ*'S PORTABILITY DISTINCTION

Saenz's portability distinction should not prevent that decision from applying to durational-residence requirements for in-state tuition at public universities. Section I.A argues that the purpose of the portability distinction in *Saenz* is unclear, but is likely intended to show which types of durational-residence requirements require strict scrutiny. Section I.B then argues that the distinction is illusory and should not prevent the application of *Saenz*'s reasoning to in-state tuition durational-residence requirements.

A. *The Purpose of Portability*

Despite the importance that courts and commentators have placed on *Saenz*'s portability distinction,[50] the Court was not terribly clear as to what function portability played in its analysis. In light of precedent, however, the Supreme Court must have intended for a benefit's portability to determine whether a court should apply strict scrutiny.

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46. *Markowitz*, 2002 WL 31428619, at *3.

47. *Id.* at *3.

48. *Id.* at *4. The court further bolstered its argument by referring the language in *Vlandis* concerning durational-residence requirements for in-state tuition. *Id.* at *4. The court then concluded that "Saenz and Vlandis did not alter well-established precedent upholding durational-residency requirements for reduced tuition in public institutions of higher learning." *Id.* at *4.

49. *See id.*

50. *See, e.g.*, Markowitz, 2002 WL 31428619, at *3–4; Lawrence J. Conlan, Note, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389, 1404–07 (2002).

Through portability, the Court seemed to have attempted to distinguish precedent holding that durational-residence requirements for divorce and college tuition were constitutional under rational basis review.[51] At least superficially, portability appears to form the dividing line between those cases that applied heightened scrutiny and those that did not. Welfare,[52] medical care,[53] and voting[54] are perhaps nonportable in that once a recipient leaves the state, the immediate benefit is no longer available; education[55] and divorce[56] benefit the recipient even after she has left the state. Thus, to a certain extent, the Court may have been trying to establish something analogous to a suspect class in equal protection analysis or a fundamental right in substantive due process analysis. The *Markowitz* court adopted this approach.[57]

At the same time, the *Saenz* Court could have meant that a benefit's portability creates a compelling state interest for states to deny certain benefits to new residents, thereby allowing such durational-residence requirements to survive at least one prong of strict scrutiny review. This reading is consistent with *Saenz*'s conclusion that with nonportable benefits, "there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit."[58]

In light of the *Shapiro* line of cases, however, the portability distinction serves a function more akin to a suspect class than a compelling state interest. Under *Shapiro*'s severe-penalties rule, strict scrutiny applies to some durational-residence requirements but not to others.[59] To be consistent with this precedent, the Court could very well have been trying to limit the application

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51. *See* Saenz v. Roe, 526 U.S. 489, 505 (1999) ("Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as divorce or a college education, that will be enjoyed after they return to their original domicile.").

52. Shapiro v. Thompson, 394 U.S. 618 (1969).

53. Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974).

54. Dunn v. Blumstein, 405 U.S. 330 (1972).

55. Sturgis v. Washington, 414 U.S. 1057 (1973); Starns v. Malkerson, 405 U.S. 985 (1971).

56. Sosna v. Iowa, 419 U.S. 393 (1975).

57. *See supra* text accompanying notes 45–49; Markowitz v. Univ. of Cal., Hastings Coll. of the Law, No. A096182, 2002 WL 31428619, at *3 (Cal. Ct. App. Oct. 30, 2002). The Alaska Supreme Court seemed to read Saenz this way as well, concluding that the Privileges or Immunities Clause allowed states to impose durational-residence requirements on receiving a cash payment, a "readily portable benefit," from the state. *See* Schikora v. Alaska, 7 P.3d 938, 946 n.30 (Alaska 2000). In so holding, the court did not consider at all the narrow tailoring required of strict scrutiny. *See id.* Consequently, the *Schikora* court most likely meant that rational-basis review would apply to such durational-residence requirements.

58. Saenz v. Roe, 526 U.S. 489, 505 (1999). It is also consistent with dicta in which the Court states that "[t]here may be substantial reason for requiring [a] nonresident to pay more than [a] resident . . . to enroll in [a] state university . . . ." *Id.* at 502.

59. *See* Shapiro v. Thompson, 394 U.S. 618, 634, 637 n.21 (1969).

of strict scrutiny to a narrow range of benefits.[60] The Court thus intended for portability to limit the cases where courts must apply strict scrutiny.[61]

B. *Portability as an Unprincipled Distinction*

Upon close inspection, the Court's effort to distinguish college tuition as a portable benefit proves to be more illusion than sound principle. The notion that college tuition is portable is predicated on the idea that one could receive the benefit of education and still reap benefits from it after moving to another state.[62] Consequently, the Court feared that eliminating durational-residence requirements for this class of benefits would encourage people to move to states only as long as necessary to obtain the desired benefit.[63] To a great extent, however, welfare payments provide just as portable a benefit as college education. Section I.B.1 argues that the welfare benefits in *Saenz* were cash payments whose ultimate utility was as portable as a subsidy for higher education. Section I.B.2 then argues that the basic evil that the Court wanted to prevent is unrelated to portability.

1. *Welfare Benefits: Portable or Nonportable?*

Portability cannot distinguish welfare from tuition subsidies. Under a temporally limited view of welfare benefits—which in *Saenz* were cash payments[64]—the benefit appears nonportable in the sense that the recipient will usually immediately spend the money and be unable to take it out of the state. This view, however, fails to recognize the ultimate utility of welfare. Critically, welfare is a portable investment in human capital, like a tuition subsidy; further, both can be similarly portable. As Chief Justice Rehnquist pointed out in his dissent to *Saenz*, the point of welfare is to give an indigent person much needed cash so that she can receive training, education, and time to look for a job.[65] Consequently, though the cash payment is consumed immediately in-state, the fruits of the benefit remain with the recipient and may benefit her wherever she goes.[66] Similarly, reduced in-state tuition is

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60. *See, e.g.*, Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 256–57 (1974) (explaining that *Shapiro* looked to penalties upon the exercise of the fundamental right to travel and that the amount of impact required to give rise to strict scrutiny was unclear).

61. Even if the portability distinction were to establish a compelling state interest and thus not limit *Saenz's* call for strict scrutiny, durational-residence requirements for in-state tuition would still likely be unconstitutional because of a lack of narrow tailoring. This point will be discussed in *infra* Part III.

62. *See Saenz*, 526 U.S. at 505.

63. *See id.*

64. *See id.* at 520 (Rehnquist, C.J., dissenting).

65. *See id. See generally* Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 96–99 (2002); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 581 (2004).

66. *See Saenz*, 526 U.S. at 519–20 (Rehnquist, C.J. dissenting).

something that a student consumes while in-state, but the benefit of access to a college education will benefit her anywhere.[67]

It is also important that the welfare benefits are cash payments. Intuitively, one would think that a cash payment is a portable benefit: one can save the money and spend it anywhere in the country, regardless of where she received it. At least one court has supported this seemingly self-evident notion that a cash payment is portable. In *Schikora v. Alaska*,[68] the Alaska Supreme Court examined the constitutionality of a state law that withheld annual Permanent Dividend Fund ("PDF") dividends from residents who had been absent from the state for more than 180 days that year.[69] Importantly, the court characterized the cash payments of dividends as "the kind of 'readily portable benefits' " for which *Saenz* permits durational-residence requirements.[70]

There is no principled reason for classifying a PDF dividend as portable and a cash payment of welfare as nonportable. Most likely, the Supreme Court characterized the welfare benefits in *Saenz* as nonportable because of the intended recipients: the poor. The indigent recipients would probably spend the cash payments immediately rather than save them for use later or elsewhere.[71] It is certainly unlikely that a welfare recipient would be capable of hoarding her cash welfare payments. In contrast, the recipient of an Alaskan PDF dividend might be able to save her cash payments. Because an Alaska state resident would qualify for PDF dividends by meeting only a very lenient set of requirements,[72] recipients could include people from the entire socioeconomic spectrum, including those who could save the money for later consumption.

Nonetheless, in classifying the PDF dividends as portable benefits, the Alaska Supreme Court did not at all seem concerned about where and when the money would be spent.[73] There was no showing that the majority of PDF dividend recipients would save the money. Moreover, it is certainly possible that for many on the margins of society in Alaska, the dividend was a critical

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67. *See id.* (Rehnquist, C.J. dissenting).

68. 7 P.3d 938 (Alaska 2000).

69. *Id.* at 939. Alaska developed a Permanent Fund into which the state deposited at least 25% of its mineral income each year. Zobel v. Williams, 457 U.S. 55, 57 (1982). The Alaska legislature enacted the PDF to distribute annually portions of the Fund's earnings to the state's residents. *Id.* at 57.

70. *Id.* at 946 n.30 (citing Saenz, 526 U.S. at 504–05).

71. *See* Saenz, 526 U.S. at 505 ("[W]hatever benefits they receive will be consumed while they remain in California . . . .").

72. The requirements include (1) applying to the Department of Revenue; (2) being a state resident on the date of application; (3) being a state resident for at least the calendar year immediately preceding January 1 of the current dividend year; (4) being physically present in the state at some time during the prior two calendar years before the current dividend year; and (5) being a United States citizen or a qualifying alien. *Schikora*, 7 P.3d at 941; *see also* ALASKA STAT. § 43.23.005(a) (1997). Interestingly, the third requirement appears to be a durational-residence requirement imposing a waiting period of up to one year for new Alaska residents, which could raise other constitutional issues. *See id.* This issue was not before the court.

73. *See Schikora*, 7 P.3d at 946 n.30 (discussing PDFs only as cash payments).

cash infusion that would be spent immediately on basic necessities of life, just like welfare. Furthermore, the PDF program seemed to contemplate that the funds would, more likely than not, be spent in Alaska; the statute strictly required that the recipient could not be absent from the state for more than 180 days, notwithstanding business or vacation.[74] As a result, both the PDF dividends in *Schikora* and the welfare benefits in *Saenz* could be viewed as cash payments consumed while the resident is in the state. Paradoxically, the courts arrived at different conclusions as to whether the benefits were portable.

Focusing on where and when the recipient will spend the money also masks the fact that the cash is most importantly a means to an end. The end itself can be equally portable in both cases. Assuming that the recipient of the cash does not give it away, she will eventually spend it on something, such as food, an education, or a car. Since it is what one gets from spending the money that is of true value to the recipient, it seems that the focus should be on that end, rather than the means to that end. If one focuses on the end—what a person can buy with the money—the portability distinction is untenable: some things that a person buys will be portable; some will not. Of particular relevance to welfare payments, a welfare recipient's expenditures can be an investment in one's own employability, which is just as portable as a PDF recipient's expenditure on a car or computer.[75] The Alaska Supreme Court thus unwittingly revealed the illusion of *Saenz*'s portability distinction. When one looks at the ultimate utility of these benefits, there appears to be no material difference between the welfare payments and the PDF dividends. As a result, *Saenz*'s portability distinction cannot stand to limit the decision's reach.

The similarity between cash welfare payments and tuition reductions in terms of portability further compels *Saenz*'s application to the latter. Tuition reductions essentially give money to those who qualify for them.[76] Like a cash payment, more affordable education is a means to an end, such as attaining marketable skills that will lead a well-paying job. This end is portable. Consequently, in terms of portability, there is little difference between welfare benefits and a reduction in tuition for state residents.

2. *Portability's Irrelevance to the Evil* Saenz *Sought to Prevent*

In trying to prevent benefit seekers from harming the states to which they flock, the Court fashioned a portability distinction that nonetheless was irrelevant to that harm. The Court specifically viewed this harm as encompassing people coming to a state only to avail themselves of attractive

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74. *See id.* at 939–40.

75. *See Saenz*, 526 U.S. at 520 (Rehnquist, C.J., dissenting).

76. *See id.* at 518 (Rehnquist, C.J., dissenting) ("The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people . . . ."); Sturgis v. Washington, 368 F. Supp. 38, 44 (W.D. Wash. 1973) (East, J., dissenting) (stating that the difference between in-state and out-of-state tuition is equivalent to a subsidy granted to the in-state student).

"portable" benefits, then leaving shortly thereafter because they could reap the rewards of the benefits elsewhere.[77] States would be inundated by benefit seekers who would soon leave the state after obtaining the costly benefits that brought them in the first place, thus depriving the state of contributions from the recipient before and after the conferral.[78]

Critically, portability is of little importance even when one considers the potential harm from the influx of welfare hunters. Even assuming that portability constitutes a workable distinction, this distinction is irrelevant; whether a benefit is portable may not change a new resident's incentive to leave a state shortly after arriving. This seemed to be the case with the welfare benefits in question in *Saenz*. California residents could receive welfare benefits for no longer than five years.[79] A person who came to California only to obtain its more generous welfare benefits would have no incentive to remain after the state has cut her off from those benefits.[80] Those who have the means to leave—certainly a possibility considering that they had the ability to come to the state in the first place—can leave. Moreover, if the recipient were able to reach self-sufficiency at or before the end of the welfare period, she could leave the state before making any significant contributions to the local economy. Even worse, those who have neither reached self-sufficiency nor have the ability to leave present another problem: they will remain in the state without contributing to the economy, but may still avail themselves of other valuable state benefits.[81]

Students may present less potential harm to states than welfare recipients. A similar flight risk is present with in-state tuition seekers: there is a risk that an out-of-state student will remain in the state only for the four years in which she obtains her undergraduate education. Concededly, it is more plausible that students have the ability to leave the state. Unlike welfare recipients, however, it is less likely that the state will have to deal with people who must remain even after availing themselves of the state benefits

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77. *See Saenz*, 526 U.S. at 505. This concern was also evident at *Saenz's* oral argument. During a discussion over whether all waiting periods were penalties, one justice said, "[T]hey could have said that not all waiting periods are penalties simply because some of them may be made to assure that . . . a person coming into the State genuinely wishes to become a resident." Transcript of Oral Argument at *10, Saenz v. Roe, 526 U.S. 489 (1999) (No. 98-97), 1999 WL 22762.

78. The harm to the state could be articulated as allowing one state to free ride off the tax efforts of another state. *See* Hills, *supra* note 10, at 297. Additionally, the state may lose the benefit of the opportunistic recipient's future contributions to the state economy through a longer stay in the state. See Kirk v. Bd. of Regents of the Univ. of Cal., 78 Cal. Rptr. 260, 269 (Ct. App. 1969).

79. Hills, *supra* note 10, at 296. The counsel for the state of California also admitted to this fact at Saenz's oral argument. *See* Transcript of Oral Argument, *supra* note 77, at *23. Under federal law, the welfare recipient also would not qualify for welfare in any other state. 42 U.S.C. § 608(a)(7) (2000). Although this nationally uniform restriction may reduce flight risk to some extent, it could also increase the likelihood that one would come to California only for welfare benefits. With only a short window in which to obtain benefits, a welfare seeker might want to obtain his benefits exclusively in a "generous" state like California.

80. *See* Hills, *supra* note 10, at 297.

81. For example, they may take advantage of public education for their children and emergency and nonemergency medical care.

but cannot contribute to the state economy.[82] Consequently, portability has little connection to the harm to states in the case of both welfare and tuition.

For these reasons, *Markowitz* should not have distinguished *Saenz* on the basis of the "portability" of the in-state tuition in question.[83] A court should therefore look to *Saenz*'s reasoning to determine if it should apply strict scrutiny to a waiting period for in-state tuition.

II. *SAENZ*'S IMPLICATIONS FOR DURATIONAL-RESIDENCE REQUIREMENTS FOR IN-STATE TUITION

Saenz significantly expanded the analysis of durational-residence requirements by adopting a nondiscrimination rule over the severe-penalties rule espoused in *Shapiro*.[84] *Saenz* stated that California's durational-residence requirement implicated the third component of the right to travel: the right of a newly arrived citizen to the same privileges or immunities enjoyed by other citizens of the state.[85] Because a new resident is entitled under the right to travel to be treated equally in her state of residence, a discriminatory classification alone constitutes a penalty.[86] As a result, *Saenz* avoided the ambiguity of the severe-penalties rule that prior cases encountered.[87] This Part argues that *Saenz* renders prior cases declining to review in-state tuition durational-residence requirements under strict scrutiny unfounded. Section II.A argues that in light of *Saenz*'s shift to a nondiscrimination rule, courts should apply strict scrutiny to durational-residence requirements for in-state tuition regardless of their effects on interstate migration. Section II.B then argues that the degree to which students are penalized for traveling to the new state is irrelevant in determining whether strict scrutiny should apply. Section II.C asserts that these durational-residence requirements should be reviewed under strict scrutiny even though in-state tuition is not a basic necessity of life. Finally, Section II.D contends that strict scrutiny applies despite the Supreme Court's affirmations of *Starns* and *Sturgis*.

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82. Some research shows that states gain more in future tax revenue from out-of-state students than in-state students. *See generally* Jeffrey A. Groen & Michelle J. White, *In-State Versus Out-Of-State Students: The Divergence of Interest Between Public Universities and State Governments* (Nat'l Bureau of Econ. Research, Working Paper No. 9603, 2003). The study by Groen and White concludes that (1) regardless of whether a student is from in-state or out-of-state, attending a university increases the probability that she will remain in that state to the same degree; and (2) out-of-state students make 25% more in future tax payments than their in-state counterparts. *See id.* at 14–23. Consequently, states may not be harmed when they eliminate durational-residence requirements for in-state tuition and attract more out-of-state students.

83. *See supra* text accompanying notes 45–49.

84. *See* Hills, *supra* note 10, at 282.

85. *See* Saenz v. Roe, 526 U.S. 489, 502 (1999).

86. *Id.* at 505.

87. Justice Marshall noted this ambiguity, eventually concluding that "*[w]hatever the ultimate parameters of the* Shapiro *penalty analysis*, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 258-59 (1974) (emphasis added) (footnote omitted).

A. *Blindness to Effects on Interstate Travel*

Much case law declining to apply strict scrutiny to durational-residence requirements for in-state tuition did so because the courts did not think that the waiting periods chilled or deterred migration into the state.[88] That could certainly be the case; in many states, a newly arrived student knows that she will be entitled to reduced tuition after her first year of education, at least if she can establish her intent to remain in the state permanently.[89]

In adopting its nondiscrimination rule, *Saenz* expressly rejected that deterrence or chilling of migration was necessary for strict scrutiny to apply.[90] The Court stated that it was not concerned solely with actual deterrence to interstate migration.[91] To this extent, *Saenz* stated nothing new; the *Shapiro* line of cases was concerned with whether the law served to penalize the exercise of the right to travel rather than whether the state actually deterred travel.[92] As a result, many pre-*Saenz* decisions in lower courts that declined to apply strict scrutiny because of a lack of deterrence to the migration are not only wrong in light of *Saenz* but are most likely wrong in light of the *Shapiro* line of cases, as well.

B. *From Penalties to Discrimination*

In light of *Saenz*, the degree to which a new resident is penalized is no longer critical. The *Shapiro* severe-penalties rule, by definition, requires asking whether the denial of in-state tuition operates as a penalty upon the

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88. *See, e.g.*, Sturgis v. Washington, 368 F. Supp. 38, 40 (W.D. Wash. 1973); Starns v. Malkerson, 326 F. Supp. 234, 237–38 (D. Minn. 1970); Ariz. Bd. of Regents v. Harper, 495 P.2d 453, 457 (Ariz. 1972); Kirk v. Bd. of Regents of the Univ. of Cal., 78 Cal. Rptr. 260, 266–67 (Ct. App. 1969).

89. For example, in Arizona, a student may be eligible for in-state tuition if she has resided in the state for at least one year, even if some of that time was spent in school, so long as she can show intent to make Arizona her permanent home. *See* ARIZ. REV. STAT. ANN. § 15-1802 (2002); ARIZ. BD. OF REGENTS, RULES AND REGULATIONS FOR ESTABLISHING RESIDENCY (May 2003), http://www.abor.asu.edu/1_the_regents/reports_factbook/residency.html#Establish%20Arizona%20residency (last visited Jan. 24, 2005). Other examples include: Colorado, *see* COLO. REV. STAT. ANN. §§ 23-7-102(5), 23-7-103(2)(c) (2004); OFFICE OF THE REGISTRAR, UNIV. OF COLO. AT BOULDER, *Qualified Person*, TUITION CLASSIFICATION REGULATIONS FOR THE UNIVERSITY OF COLORADO AT BOULDER (Oct. 19, 2005), http://registrar.colorado.edu/students/tuition_classification_regulations.html#qualifiedperson; New York, *see* N.Y. COMP. CODES. R. & REGS. tit. 8, § 302.1(a)(6) (2001); STUD. RESPONSE CTR., STATE UNIV. OF N.Y., NEW YORK STATE RESIDENCY REQUIREMENTS FOR TUITION PURPOSES (Jan. 27, 2005), http://src.buffalo.edu/studentaccount/residency.shtml; and North Carolina, *see* N.C. GEN. STAT. § 116-143.1(b) (2002); OFFICE OF THE UNIV. REGISTRAR, UNIV. OF N.C., RESIDENCY REFERENCE (May 11, 2005), http://regweb.oit.unc.edu/residency/ncres.php. During the *Saenz* oral argument, one justice asked, "Then what good does the 1-year residency assure? What good does that do . . . if it simply requires the college freshman to stay there until he's a sophomore?" Transcript of Oral Argument, *supra* note 77, at *39. The counsel for Roe essentially responded not by addressing the deterrence aspect, but rather by asserting that the state had an interest in ensuring that the student—part of a suspicious, transient class—was a bona fide resident. *See id.* at *39–*40.

90. *See Saenz*, 526 U.S. at 505; *see also* Hills, *supra* note 10, at 282.

91. *See Saenz*, 526 U.S. at 505.

92. *See, e.g.*, *Maricopa County*, 415 U.S. at 258.

exercise of the right to travel.[93] Arguably, the penalty upon a student is not very significant because she is not completely foreclosed from obtaining higher education in her new state of residence; she could still attend a public university in that state, though at a higher tuition rate for a set period of time. Moreover, out-of-state tuition for *some* students may not be much worse than their other realistic options. For example, a smart, aspiring engineer from New York might have to pay higher out-of-state tuition at the University of California at Berkeley, but that could still be less expensive than her alternatives of Stanford and M.I.T.[94] This student would not be terribly penalized by attending Berkeley.

Saenz renders this inquiry irrelevant. The Court rejected California's defense that the welfare recipients were no worse off than they were in their previous states because their welfare benefits would be the same.[95] Furthermore, like differences in tuition between residents and nonresidents, *Saenz* did not involve an outright denial of the benefit, but rather a reduction in what was available to new residents compared with what was available to longer-term residents. Because the focus is now on whether there is discrimination between new and old residents, it seems that a state's denial of in-state tuition to those who have resided in the state for less than a requisite period of time is sufficient discrimination to infringe upon the right to travel.[96] The concept of penalty thus drops out of the picture; disparate treatment is the triggering condition.[97]

As a result, courts should not consider whether a durational-residence requirement for in-state tuition serves as a penalty upon the newly arrived students. As with the welfare benefits in *Saenz*, states imposing such requirements create discriminatory classifications between bona fide residents based upon how long they have resided in the state.[98] It is immaterial how

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93. *Shapiro*, for example, seemed to leave this an open question in its famous footnote twenty-one. *See* Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

94. On the other hand, the cost difference may be substantial for a needy student choosing between a public university in her own state and a public university in another state. The penalty may be all the worse if the out-of-state school provided unique opportunities not available in her own state, such as a leading volcanology program in Hawaii.

95. *See Saenz*, 526 U.S. at 496. Note that this defense was probably not entirely accurate. The cost of living in California is higher than most other states, so a new resident whose welfare benefits are pegged at those of her previous state would be worse off and consequently penalized in terms of buying power. *See* Hills, *supra* note 10, at 282. At oral argument, the Court seemed to recognize this cost of living disparity, *see* Transcript of Oral Argument, *supra* note 77, at *18, but did not address it in the opinion. Because the Court held that the discrimination alone constituted a penalty, it does not appear that the cost-of-living adjustment made any difference in the Court's opinion. *See Saenz*, 526 U.S. at 505.

96. *See Saenz*, 526 U.S. at 505.

97. The notion that disparate treatment between newly arrived residents and long-term residents should trigger heightened scrutiny is not new. In his dissent to *Sturgis*, Judge East, who believed a durational residence requirement for in-state tuition failed strict scrutiny, wrote that the "freedom to travel . . . embraces the fundamental right of an individual to . . . receive equal treatment under the laws of a given state." Sturgis v. Washington, 368 F. Supp. 38, 43 (W.D. Wash. 1973) (East, J., dissenting).

98. *See Saenz*, 526 U.S. at 505.

burdened the newly arrived resident is by the denial. As the Court in *Saenz* wrote, a court should review under strict scrutiny "a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than" a requisite period of time.[99]

C. *Applying* Saenz *Beyond the Basic Necessities of Life*

One might question whether *Saenz* requires that a court apply strict scrutiny to any durational-residence requirement, regardless of what benefit is at issue. Because *Saenz* involved welfare, which the Supreme Court has viewed as implicating the basic necessities of life,[100] perhaps the decision's nondiscrimination rule only applies to similar types of benefits. This narrow application would leave undisturbed several pre-*Saenz* tuition cases declining to apply strict scrutiny because higher education is not a basic necessity of life.[101]

Despite that *Saenz* involved welfare, its nondiscrimination rule extends beyond the basic necessities of life to important benefits like in-state tuition for higher education. Section II.C.1 argues that although it is unclear if *Saenz* requires that all durational-residence requirements survive strict scrutiny, pre-*Saenz* precedent can shed light on the minimum extent to which the nondiscrimination rule should apply. Section II.C.2 then argues that pre-*Saenz* precedent shows that in-state tuition for higher education is important enough of a benefit to merit strict scrutiny under *Saenz*'s rule.

1. *How Far Does* Saenz *Go?*

Only by looking to pre-*Saenz* cases applying strict scrutiny can one predict the minimum range of cases in which *Saenz*'s nondiscrimination rule applies. The exact boundaries of the rule remain unclear. Arguably, this nondiscrimination rule could be completely indifferent to the type of discrimination at issue. In finding authority in the Privileges or Immunities Clause, the Court spoke only of equality of treatment between new and old residents without qualification.[102] On the other hand, *Saenz* still involved what the Supreme Court has consistently considered a basic necessity of life.[103] Because *Saenz* dealt with welfare like *Shapiro* and did not disapprove of the tuition cases like *Starns* and *Sturgis* or the divorce case *Sosna v. Iowa*, perhaps its rule should be confined within the narrow context of basic necessities of

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99. *Id.* at 504.

100. *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

101. *See, e.g.*, *Sturgis*, 368 F. Supp. 38 (W.D. Wash. 1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970); Kirk v. Bd. of Regents of the Univ. of Cal., 78 Cal. Rptr. 260 (Ct. App. 1969).

102. See *supra* text accompanying notes 26–29.

103. Arguably, *Saenz* did not involve the basic necessities of life because the welfare recipients in question were not denied welfare altogether, but rather were denied the incremental difference between the benefits offered in California and the benefits offered in their previous states of residence. *See Saenz*, 526 U.S. at 493. Consequently, unlike an outright denial as in *Shapiro*, the recipients might still have sufficient welfare support to obtain the basic necessities of life.

life and fundamental rights.[104] A corollary of this reading is that the Court did not intend for *Saenz* to apply to all disparate treatment of newly arrived residents.[105] This reading is most consistent with precedent upholding some durational-residence requirements.[106] It also could explain the Court's illusory portability distinction.

Despite this uncertainty, pre-*Saenz* precedent provides guidance as to the types of benefits whose denial merits strict scrutiny under the nondiscrimination rule. By concluding that the disparate treatment at issue itself—without regard to the degree of penalization—constituted a significant enough penalty to warrant strict scrutiny,[107] *Saenz* sought to extend the protection of the right to travel beyond what the *Shapiro* line of cases provided for. Because it expanded the right's range of protection, the nondiscrimination rule should at least cover the types of benefits meriting strict scrutiny under the severe-penalties rule. Furthermore, for equality of treatment to be meaningful, this level of scrutiny must extend to other types of benefits that are as important to residents as those protected under pre-*Saenz* precedent. If a state is to treat new residents like all other residents, it must at least treat them equally in the most important respects.

2. *Denial of Tuition Subsidies as Worthy of Strict Scrutiny*

Assuming that *Saenz* should not stand for the proposition that strict scrutiny applies to *all* disparate treatment between bona fide residents based upon length of residence, pre-*Saenz* precedent seems to show that *Saenz* should apply to important benefits like reduced tuition for higher education.

Courts have long held that they will sometimes review durational-residence requirements under strict scrutiny even when the denied benefit or right is not essential to one's survival. For example, the Supreme Court held in *Blumstein* that durational-residence requirements implicating important rights such as the right to vote must satisfy strict scrutiny.[108] In a somewhat similar context, one district court has suggested that heightened scrutiny may be appropriate for evaluating durational-residence requirements for running for public office. *Callaway v. Samson*[109] reviewed the constitutionality of a New Jersey law requiring that a candidate for local office have

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104. *See, e.g.*, Nelson, *supra* note 28, at 218–19 (arguing that *Saenz* cannot apply so broadly that it would completely overhaul durational-residence requirement case history). The Court may also have been reluctant to overrule *Sosna v. Iowa*, 419 U.S. 393 (1975), because of its reluctance to involve itself in the area of family law—an arena governed by state law. *See* Katharine B. Silbaugh, Miller v. Albright: *Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1139–40 (1999).

105. In contrast, Chief Justice Rehnquist feared that *Saenz* would prevent states from imposing durational-residence requirements in almost any case. *See Saenz*, 526 U.S. at 515 (Rehnquist, C.J., dissenting).

106. *See, e.g.*, *Sosna*, 419 U.S. 393 (1975).

107. *See supra* Section II.B.

108. Dunn v. Blumstein, 405 U.S. 330 (1972).

109. 193 F. Supp. 2d 783 (D.N.J. 2002).

resided in the "local unit" for which he sought office for at least a year prior to the date on which the election for office was to be held.[110] The court ultimately struck down the law as violating the fundamental right to *intra*state travel under the Due Process Clause.[111] Nevertheless, the court stated in dicta that if the plaintiff had come from another state, he would have had a "plausible argument" that the durational-residence requirement was an undue burden on his right to travel under *Saenz*.[112] Consequently, the right to travel at least protects against states denying some things that are *important* to its newly arrived citizens.

Of course, because these decisions involve voting and elections, they do not necessarily imply that the right covers college tuition. A durational-residence requirement for voting involves a fundamental right,[113] whereas a durational-residence requirement for in-state tuition involves a benefit to which one has no fundamental right.[114] Similarly, the *Callaway* court characterized eligibility for public office as "one of the highest honors and privileges of our democratic system."[115] It also stressed that the law could exclude candidates from running for open seats or seats with vulnerable incumbents.[116] As a result, *Callaway*'s dicta may have been heavily driven by the court's fear of the law's effects on our democratic system rather than its effects on new residents.

Nevertheless, other decisions by the Supreme Court show that the right to travel extends to important benefits that are neither fundamental rights nor important to maintaining democracy. In *Attorney General of New York v. Soto-Lopez*,[117] the Court struck down a New York law that gave a one-time preference for civil service jobs to veterans who, among other things, were New York residents when they entered military service.[118] The plurality opinion held that denial of the benefit of a preference for a civil service job constituted denial of "a significant benefit . . . [that] may not rise to the same level of importance as the necessities of life and the right to vote, [but is] unquestionably substantial" in that it could be a determinative factor in whether the applicant obtained the civil service job.[119] By denying this benefit to those who were not New York residents at the time they entered service, the state penalized the exercise of the right to travel; therefore, the

110. *Id.* at 785.

111. *See id.* at 786, 789.

112. *Id.* at 786.

113. *See Blumstein*, 405 U.S. 330, 336 (1972).

114. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

115. *Callaway*, 193 F. Supp. 2d at 787.

116. *Id.*

117. 476 U.S. 898 (1986) (plurality opinion).

118. *Id.* at 900–01. The preference amounted to an addition of points to a job applicant's examination score (amounting to two-and-one-half to ten additional points, depending upon the examination and whether the veteran had been disabled during war). *Id.* at 900 & n.1.

119. *Id.* at 908.

court subjected the law to strict scrutiny.[120] Granted, the law in *Soto-Lopez* did not involve a classical durational-residence requirement, where one must be a bona fide resident of the state for a requisite period before she qualifies for a particular benefit. Rather, it involved fixed, permanent distinctions between classes of bona fide residents.[121] New York's durational-residence requirement is nonetheless similar to classical durational-residence requirements in that they both distinguish between bona fide residents based upon when they became state residents.[122] Consequently, *Soto-Lopez* shows that the right to travel may be infringed when a durational-residence requirement places a bona fide resident at a disadvantage in obtaining a particular job.[123]

Also in the context of employment, several lower courts have struck down durational-residence requirements for taking a state's bar exam. Unfortunately, these decisions conflict as to what level of scrutiny applies. *Keenan v. Board of Law Examiners*[124] concluded that strict scrutiny applies because the eligibility requirement penalized the exercise of the right to travel.[125] The court took advantage of Chief Justice Warren's dissent in *Shapiro*, which noted the implications of the decision to "eligibility . . . to engage in certain professions or occupations or to attend a state-supported university."[126] Although a newly arrived, aspiring attorney likely had other areas of employment available to her, the court concluded she could nonetheless be deterred from migrating to the state both because of a loss in earnings and a loss of "true personal fulfillment . . . in the active practice of the profession to which [she] has dedicated [herself]."[127] On the other hand, two other decisions struck down similar bar exam requirements but declined to apply heightened scrutiny. *Smith v. Davis*[128] held simply that the requirements had no rational basis under the Due Process or Equal Protection clauses to an applicant's fitness or competency to practice law.[129] *Lipman v.*

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120. *Id.* at 909.

121. *Id.* at 908.

122. Though in the case of *Soto-Lopez*, that point in time is measured by when that person entered military service and in the case of a typical durational-residence requirement, that point is measured by how long ago the person migrated to the state, there is still a resulting classification between bona fide residents. *Cf.* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985) ("[T]he Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'" (quoting Zobel v. Williams, 457 U.S. 55, 59 (1982)) (omissions in original)).

123. Interestingly, *Soto-Lopez* somewhat chipped away at *Shapiro*'s infamous footnote 21 which, among other things, stated that durational-residence requirements might be permitted for licenses to practice a profession. *See* Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

124. 317 F. Supp. 1350 (E.D.N.C. 1970).

125. *Id.* at 1362. *Keenan* thus chipped even further away at *Shapiro*'s dicta in footnote 21. *See Shapiro*, 394 U.S. at 638 n.2; *supra* note 123.

126. *See Keenan*, 317 F. Supp. at 1361 n.15 (quoting *Shapiro*, 394 U.S. at 655 (Warren, C.J., dissenting).

127. *Keenan*, 317 F. Supp. at 1362.

128. 350 F. Supp. 1225 (S.D.W.V. 1972).

129. *Id.* at 1229.

Van Zant[130] held that the requirement failed to have a rational basis under Equal Protection.[131] In a brief paragraph, the court simply referred to *Shapiro*'s silence as to whether durational-residence requirements for licenses to practice a profession were constitutional.[132]

Given the Supreme Court's subsequent decision in *Soto-Lopez*, *Keenan* seems to have reached the proper conclusion in applying strict scrutiny. *Soto-Lopez* involved only an advantage in obtaining a job, whereas the bar exam requirements involved the ability to practice law. Denial of bar admission to a lawyer is at least as much of a denial of a significant benefit as the additional test points at issue in *Soto-Lopez*. Further, from the perspective of deterring interstate travel, the certain inability to practice in one's career of choice would be even more preclusive that the possible failure of obtaining a civil service job.

In light of *Soto-Lopez* and *Keenan*, heightened scrutiny seems appropriate when new residents face a more significant hurdle in obtaining employment than longer-term residents. This hurdle need not be permanent or make the employment at issue unobtainable. Although *Keenan* involved complete exclusion from the practice of law,[133] *Soto-Lopez* proposes that a complete denial is unnecessary to trigger heightened scrutiny because the applicants in that case were still eligible for civil service jobs, though they were at a disadvantage.[134]

One should not synthesize these cases to show that strict scrutiny is suitable only for durational-residence requirements involving (1) permanent, partial denials of benefits or (2) temporary, complete denials of benefits. First, *Saenz* shows that the denial of a benefit need not be complete to implicate the right to travel.[135] Second, whether one evaluates the requirement under the severe-penalties or nondiscrimination rule, a denial's effect upon a new resident does not turn upon whether the denial is complete or partial, but rather what has been denied.[136] In fact, a temporary, partial denial of an important benefit can be more onerous than a permanent, complete denial of a much less important benefit.[137]

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130. 329 F. Supp. 391 (N.D. Miss. 1971).

131. *See id.* at 400–01.

132. *See id.* at 401 & 401 n.28 (construing Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969)).

133. *See* Keenan v. Bd of Law Exam'rs, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970).

134. *See* Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 911 (1986).

135. *See* Saenz v. Roe, 526 U.S. 489, 504–05 (1999) (stating that the Court's decision does not turn upon the fact that there was only a partial withholding of benefits).

136. It is semantic to argue whether a denial is complete or partial because any denial may be characterized as complete. For example, the durational-residence requirement in *Saenz* could be characterized as a complete denial of treatment as a long-term California welfare recipient. A far more probative inquiry is how the durational-residence requirement affects the new resident.

137. For example, a temporary denial of the right to drive an automobile at night (but with no restrictions on driving during the day) is likely far more burdensome to most people than a permanent denial of the right to operate a boat at any time.

Education is an especially important state service. Concededly, the Supreme Court has held that there is no fundamental right to education.[138] Furthermore, lower courts have consistently refused to equate education with the basic necessities of life.[139] Courts have, however, recognized that education is a very important benefit.[140] Consequently, education is, at the very least, distinguishable from other types of benefits whose denial may seem more trivial, like obtaining a license to hunt or fish.[141]

The denial of in-state tuition is a significant hurdle to obtaining this important service. As in *Soto-Lopez*, the state does not deny a new resident higher education, but rather places her at a disadvantage in obtaining it compared to longer-term residents. Moreover, this difference, at least for less affluent students, can determine whether higher education in that state is financially feasible.[142] Higher education is also at least as important an opportunity as the civil service job at issue in *Soto-Lopez*. The Supreme Court considered the employment at issue important because of "its attendant job security, decent pay, and good benefits."[143] A college or graduate education can provide similar advantages.[144]

The foregoing decisions show that *Saenz*'s nondiscrimination rule applies, at a minimum, where important, but not necessarily fundamental or vital, benefits are concerned. Higher education appears to belong to this class of benefits. Accordingly, because durational-residence requirements for in-state tuition result in disparate treatment, a court should review such requirements under strict scrutiny.

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138. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

139. *See* Lister v. Hoover, 706 F.2d 796, 798 (7th Cir. 1983) (Swygert, J., dissenting); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970); Markowitz v. Univ. of Cal., Hastings Coll. of the Law, No. A096182, 2002 WL 31428619, at *2 (Cal. Ct. App. Oct. 30, 2002); Gurfinkel v. L.A. Cmty. Coll. Dist., 175 Cal. Rptr. 201, 204 (Ct. App. 1981); Kirk v. Bd. of Regents of the Univ. of Cal., 78 Cal. Rptr. 260, 266 (Ct. App. 1969).

140. Perhaps the most famous and poignant statement of the importance of education is in *Brown v. Board of Education*, 347 U.S. 483 (1954), where Chief Justice Earl Warren wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces.

Id. at 493. In the context of the right to travel, courts have defended the importance of education in *Lister*, 706 F.2d at 798; *Starns*, 326 F. Supp. at 238; *Markowitz*, 2002 WL 31428619 at *2; *Gurfinkel*, 175 Cal. Rptr. at 204; and *Kirk*, 78 Cal. Rptr. at 266.

141. The author mentions these particular benefits because *Shapiro*'s famous footnote stated that the denial of such benefits may not constitute penalties upon the exercise of the right to travel. *See* Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

142. *Cf.* Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 908 (1986) ("The award of bonus points can mean the difference between winning or losing civil service employment . . . .").

143. *Id.*

144. A particular state university may also provide unique and valuable benefits compared to other options, as discussed *supra* note 94.

D. *Consequences for* Sturgis *and* Starns

A principal contention against use of strict scrutiny for in-state tuition could be the Supreme Court's summary affirmations of *Starns* and *Sturgis*. As discussed earlier, those district courts upheld durational-residence requirements for in-state tuition under rational basis review.[145] In deciding *Saenz*, the Court never disapproved or overruled these cases. In fact, the Court may have implicitly reaffirmed them through its fashioning of the portability distinction, which it supported by citation to *Vlandis*'s dicta concerning waiting periods for in-state tuition.[146]

Nonetheless, *Starns* and *Sturgis* cannot stand as principled decisions in light of the reasoning behind *Saenz*. The Court issued no opinion in either case, leaving only the district court opinions as windows to its thought processes. The district courts distinguished *Shapiro* and its call for strict scrutiny on the grounds that (1) they did not think that the requirements were created with the purpose or effect of deterring out-of-state students from attending in-state universities, and (2) the requirements did not deny the students the basic necessities of life.[147] On the second prong, although the *Starns* court "fully recognize[d] the value of higher education, [it could not] equate its attainment with food, clothing and shelter."[148] The courts thus used *Shapiro*'s severe-penalties rule and ultimately concluded that there was no penalty upon the exercise of the right to travel warranting heightened scrutiny.[149]

These lower court decisions are no longer valid. The reasoning of these opinions, which relies upon *Shapiro*'s severe-penalties rule, is plainly inconsistent with the nondiscrimination rule established by *Saenz*.[150] Moreover, the portability distinction is a fiction that cannot shield in-state tuition from *Saenz*'s new rule.[151]

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145. See *supra* text accompanying notes 37–49.

146. *See* Saenz v. Roe, 526 U.S. 489, 505 (1999) (citing *Vlandis v. Kline*, 412 U.S. 441 (1973)).

147. *See* Sturgis v. Washington, 368 F. Supp. 38, 40–41 (W.D. Wash. 1973); Starns v. Malkerson, 326 F. Supp. 234, 237–38 (D. Minn. 1970). One can certainly criticize the first distinction in light of *Blumstein*, which concluded that *Shapiro* did not rest upon any finding of actual deterrence of travel. Dunn v. Blumstein, 405 U.S. 330, 340 (1972). The second distinction is more troublesome, but it is no longer applicable in light of *Saenz*, as discussed in *supra* Section II.C.

148. *Starns*, 326 F. Supp. at 238.

149. *See id.*

150. As discussed in the *supra* text accompanying note 147, the courts' decisions were predicated upon conclusions that the denials neither deterred interstate travel nor involved basic necessities of life. *See supra* Sections II.A and II.C for a discussion of why *Saenz* requires neither for strict scrutiny to apply.

151. *See supra* Part I.

III. DURATIONAL-RESIDENCE REQUIREMENTS FOR IN-STATE TUITION UNDER STRICT SCRUTINY

When one reviews in-state tuition durational-residence requirements under strict scrutiny, their unconstitutionality is quickly revealed. In order to survive strict scrutiny, the requirement must be narrowly tailored to advance a compelling state interest.[152] States commonly claim that these requirements are necessary to achieve partial cost equalization between new and old residents,[153] facilitate residency determinations,[154] and limit reduced tuition to those likely to make future contributions to the state's economy.[155] The justifications that have been or are likely to be advanced for these requirements either are not compelling or use means not narrowly tailored to achieve them.[156]

The justification that the requirement is necessary to achieve partial cost equalization is not compelling. The basis of this justification is that states may collect lower tuition from those who have made recent contributions to the state or have recently spent money in the state for a brief period before enrolling in a state school.[157] Thus, until a new resident makes some contribution to the state's welfare, she is not entitled to the same privileges as longer term residents. A very similar justification failed scrutiny in *Shapiro*. *Shapiro* rejected distinctions between new and old residents based upon contributions they had made to the community in the form of taxes.[158] The Court held the contribution justification constitutionally impermissible despite the state's valid interest in maintaining its fiscal integrity.[159] Under a contrary ruling, states would be able to apportion or deny benefits such as schools, parks, or police and fire protection based upon a citizen's past tax contributions.[160] The same constitutional objection applies to contributions made directly to the state economy since both involve benefits conferred to the local community.

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152. *Saenz* stated that the level of review was at least as strict as that in *Shapiro*, which required that the durational-residence requirement be "necessary to promote a *compelling* governmental interest." Saenz v. Roe, 526 U.S. 489, 499 (1999) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)). "Necessary" implies that less restrictive means are unavailable, therefore embracing the traditional "narrow tailoring" prong of strict scrutiny.

153. States advanced this justification in *Sturgis v. Washington*, 368 F. Supp. 38, 41 (W.D. Wash. 1973); *Starns*, 326 F. Supp. at 240; *Markowitz v. University of California, Hastings College of the Law*, No. A096182, 2002 WL 31428619, at *3 (Cal. Ct. App. Oct. 30, 2002); and *Kirk v. Board of the Regents of the University of California*, 78 Cal. Rptr. 260, 269 (Ct. App. 1969).

154. Arizona advanced this justification in the context of nonemergency medical care in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267 (1974).

155. California advanced this justification in *Kirk*, 78 Cal. Rptr. at 269.

156. This Part does not exhaust all possible justifications that a state may offer. In general, however, durational-residence requirements for in-state tuition are unlikely to be narrowly tailored to meet any potentially compelling interest.

157. *See Sturgis*, 368 F. Supp. at 41; *Starns*, 326 F. Supp. at 240; *Markowitz*, 2002 WL 31428619 at *3; *Kirk*, 78 Cal. Rptr. at 269.

158. Shapiro v. Thompson, 394 U.S. 618, 632 (1969).

159. *Id.* at 633.

160. *Id.* at 632–33.

The justification that these durational-residence requirements are administratively convenient methods for determining residency also cannot withstand strict scrutiny. *Maricopa County* held that a durational-residence requirement is not narrowly tailored to this end because it is overinclusive.[161] Overinclusiveness is apparent since one may become a bona fide resident of a state within any period of time after entering the state.[162]

These durational-residence requirements cannot be constitutionally permissible on the ground that they are the only way to determine residency and thus as narrowly tailored as practically feasible.[163] These requirements are not the only method of determining a person's residency status. Some colleges look to other indicators, avoiding a strict durational-residence requirement.[164] Similarly, in determining one's residency for tax purposes, California lists thirteen factors—none of which involve the length of stay in the state—to determine residency and calls for comparing these factors across the different states to which a person has ties.[165] Many of these, such as location of social ties, family, and principal residence, apply to students.[166] Accordingly, just as *Shapiro* concluded that other investigatory tools allowed states to determine a welfare applicant's residency status,[167] state colleges and universities should have other means for evaluating a student's residency status. With these identification tools, states need not worry that the constitutional requirements of the right to travel will threaten their ability to provide low-cost public education to their bona fide residents.

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161. Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 267 (1973).

162. Eastman v. Univ. of Mich., 30 F.3d 670, 673 (6th Cir. 1994). The requirement also could not be justified as a factor under *Vlandis v. Kline*, 412 U.S. 441, 452 (1972), since a strict one-year waiting period would be conclusive rather than just a factor.

163. Chief Justice Rehnquist took this position in his dissent to *Saenz*, claiming that the durational-residence requirement served as an objective test of a resident's subjective intent to remain in the state. *See* Saenz v. Roe, 526 U.S. 489, 517 (1999) (Rehnquist, C.J., dissenting). *Vlandis* may have considered the administrative efficiency of such requirements in suggesting that it could be a factor in determining bona fide residence. *See Vlandis*, 412 U.S. at 452–53.

164. The University of Cincinnati, for example, provides several ways of demonstrating a student's residency that do not require a one-year stay in the state. *See* OFFICE OF THE REGISTRAR, UNIV. OF CINCINNATI, APPLICATION FOR CHANGE IN RESIDENCY CLASSIFICATION INSTRUCTION SHEET (Feb. 1985), http://www.onestop.uc.edu/forms/info_change_residency.pdf . These include (1) people who have full- or part-time employment in the state on a self-sustaining basis and are pursuing a part-time program at an institution of higher learning; and (2) dependent students whose parents, as of the first day of classes, have accepted full-time, self-sustaining employment and established domicile in the state for reasons other than obtaining more favorable tuition rates. *Id.*

165. FRANCHISE TAX BD., STATE OF CALIF., FTB PUBLICATION 1031: GUIDELINES FOR DETERMINING RESIDENT STATUS—2004 (2004), *available at* http://www.ftb.ca.gov/forms/04_forms/04_1031pub.pdf.

166. Of course, an income-tax payer has less incentive to establish residency than a student, reducing the likelihood that nonresidents will abuse the system. For instance, California taxes nonresidents only on income from California, whereas it taxes residents on all income regardless of its source. *Id.* at 4. Nevertheless, these provisions show that states can rely on other indicia to determine a person's residency.

167. *See* Shapiro v. Thompson, 394 U.S. 618, 636 (1969) ("[T]he welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.").

The justification that in-state tuition should be limited to those willing to make future contributions to the state economy should fail because a durational-residence requirement is not narrowly tailored to that end. This justification only makes sense when the waiting period is applied to non-bona-fide residents; a bona fide resident would intend to remain in the state and make the desired future contributions. The requirement would thus lack even a rational basis if a state intentionally applied it to all new residents, bona fide or otherwise.[168] On the other hand, if this requirement were intended to apply only to non-bona-fide residents, it would be overinclusive for reasons similar to a justification of administrative ease.

Finally, even if *Saenz* can be read to establish a compelling state interest in restricting the apportionment of portable benefits,[169] a durational-residence requirement would not be narrowly tailored to achieve that end. The concern surrounding the portability of a benefit is that a temporary resident will leave after acquiring the benefit and enjoy it after returning to her previous state of residence.[170] The waiting period, however, would be both overinclusive and underinclusive. It would burden new bona fide residents who genuinely wish to take advantage of the benefit in their new state of residence; it would also fail to account for residents who have no intention of remaining in the state but have lived in the state for just a little longer than the requisite waiting period. Such a blunt tool cannot pass the rigors of strict scrutiny.

CONCLUSION

Saenz thus has implications far beyond what the Supreme Court likely envisioned. The Court's attempt to cabin the decision through the portability distinction cannot serve as a principled reason to limit the scope of its holding. *Saenz*'s nondiscrimination rule flows over at least the broad range of state benefits that other case law has held significant enough to be protected by the fundamental right to travel. The similarity of in-state tuition to these other benefits, combined with the nondiscrimination rule, leads logically toward strict scrutiny review of these waiting periods. Much to the delight of traveling students, the states are unlikely to offer any justification that will pass constitutional muster under that standard. *Saenz*'s broad impact can certainly spell trouble for other durational-residence requirements that have yet to be declared unconstitutional.[171] The decision truly ensures that once one decides to make a state her indefinite home, she may not be treated as a temporary interloper. States must account for this constitutional protection in fashioning their residency requirements.

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168. *Cf.* Eastman v. Univ. of Mich., 30 F.3d 670, 673 (6th Cir. 1994).

169. This possible reading is discussed in *supra* Section I.A.

170. *See* Saenz v. Roe, 526 U.S. 489, 505 (1999).

171. Divorce is one possibility, *see* Sosna v. Iowa, 419 U.S. 393 (1975), despite any reluctance by the Supreme Court to involve itself in family matters. *See supra* note 104.